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No. 01-1368

IN THE SUPREME COURT OF THE UNITED STATES

NEVADA DEPT OF HUMAN RESOURCES,
PETITIONER,

V.

HIBBS, WILLIAM, ET AL
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONERS

Kenneth B. Clark*
1449 Pennsylvania AVE, SE
Washington, DC 20003
202 544 7000
*Counsel of Record

36 pp

QUESTIONS PRESENTED

Is the care-taking leave provision, or any other provision of FMLA a valid enactment of Congress under the Fourteenth Amendment?

Can Congress abrogate Eleventh Amendment Immunity under the enforcement provisions of the Fourteenth Amendment?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner and counsel to the respondents have consented to the filing of this amicus brief. Consent letters are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The framers of the Fourteenth Amendment never intended to prohibit diverse treatment of men and women when they wrote the equal protection clause. That fact was the basis of over a century of consistent jurisprudence by this Court. So even if Congress claimed to be enforcing the requirements of the Fourteenth Amendment, provisions against sex discrimination would not be "appropriate legislation."

Moreover, the text of the FMLA strongly suggests that Congress did not pass that act to enforce the Fourteenth Amendment. Attempts by the government to defend FMLA application to States under the Fourteenth Amendment is a post hoc attempt to justify constitutionally dubious provisions, which are impermissible under the "commerce clause."

Finally, we urge the Court to revise its understanding of the relation between the Fourteenth and Eleventh Amendments. This Court for more than a century believed that both amendments could be given full effect side by side (e.g. *ex parteYoung*), and the Court's *Fitzpatrick* decision handed down more than a century after

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

ratification of the Amendment was a solitary departure from established precedent. *Fitzpatrick* remains the only case in which this Court has permitted suit against an unconsenting State under the Fourteenth Amendment.

ARGUMENT

I. FMLA was not validly enacted under the Fourteenth Amendment

A. Equal protection does not mean "equal treatment"

Congress allegedly enacted the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 et seq., "to promote the goal of equal employment opportunity for women and men pursuant to [the equal protection] clause" 2601(b)(5). We do not believe that such a statement amounts to a claim to have been enacting FMLA under the Fourteenth Amendment. To "promote the goals" of an amendment is not the same things as to be "enforcing" an amendment.

As a matter of first principles, however, we feel compelled to point out that the equal protection clause does not guarantee "equal employment opportunity for men and women." The Framers of the Fourteenth Amendment surely never imagined such a thing, and for a full century following the adoption of the Amendment up through the most recent cases, this Court has repeatedly found that "equal treatment" is not required.

Constitutional scholars, on the left and the right, are virtually unanimous in the view that the Framers of the Fourteenth Amendment did not mean to include sex discrimination in its confines. As Justice Ginsberg noted in a 1979 discussion of the Fourteenth Amendment given at Washington University:

> The equal status and dignity of men and women under the law is the animating purpose of the proposed Equal Rights Amendment. By contrast, the framers of the fourteenth amendment did not contemplate sex equality. Boldly dynamic interpretation, departing radically from the original understanding, is required to tie the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities and opportunities. . . . [it is] difficult to elaborate bold doctrine regarding sex discrimination when even a starting point is impossible to anchor in the constitutional fathers' design.[2]

There is ample evidence from the debates on the Fourteenth Amendment and simultaneous debates on the Civil Rights Act to justify Justice Ginsberg's conclusion. Numerous congressmen made comments pointing out that "equal protection" did not mean that women and children would be entitled to the same civil rights as adult men:

> Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of citizens shall be held by all races in equality. Your State may deprive women of the right to sue or to contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures–not to all citizens, but to all races as races who are citizens–equality of protection in those enumerated civil rights which states may deem proper to confer upon any races. Globe at 1295.

A long and consistent string of precedents by this Court also bears out Justice Ginsberg's conclusion.

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[2] Ruth Bader Ginsberg, "Sexual Equality under the Fourteenth and Equal Rights Amendments," *Wash. U. Law Q.* vol 1979:159, 161-178.

Just five years after ratification of the Fourteenth Amendment this Court in *Bradwell v. Illinois*, 83 U.S. 130 (1873) upheld the prohibition on women practicing law, explicitly rejecting the view that the Fourteenth Amendment required equal treatment of woman: "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." While many people today might reject that theory, there is little doubt that this expressed the views of the majority of people at the time of ratification as well as the views and intentions of the Framers.

This Court continued to hold that basic position for decades. The Court repeatedly upheld laws restricting women from working in various "dangerous" or inappropriate jobs: *Muller v. Oregon*, 208 U.S. 412 (1908) and *Dominion Hotel v. Arizona*, 249 U.S. 265 (1919) limiting the hours a woman could work; *Radice v. New York*, 264 U.S. 292 (1924) limiting night work by women. In 1937 the Court upheld a separate minimum wage law for woman and minors which did not apply to men, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. In 1948, the Court upheld prohibitions on women tending bar, *Goesaert v. Cleary*, 335 U.S. 464. The Court upheld both exclusion of woman from juries, and in 1961 the exemption of women from jury duty who did not wish to serve, *Hoyt v. Florida*, 368 U.S. 57. These are just a few of the decisions of this court permitting unequal treatment of men and women in employment.

Today, many of these views would be regarded as archaic. However, if "the original understanding underpinning High Court precedent from 1873 to 1961" (Ginsberg, Sexual Equality, 163) means anything, then this history and precedent cannot be simply disregarded. We believe it must be taken into account when considering the meaning and scope of the Fourteenth Amendment.

As Justice Rehnquist wrote in dissent for *Trimble v. Gordon* (430 U.S. 762 (1977)):

> Every law enacted, unless it applies to all persons at all times and in all places, inevitably imposes sanctions upon some and declines to impose the same sanctions on others. But these inevitable concomitants of legislation have little or nothing to do with the Equal Protection Clause of the Fourteenth Amendment, unless they employ means of sorting people which the draftsmen of the Amendment sought to prohibit.

While the Court in recent years has on occasion departed from both its earlier precedents and the intent of the Framers, the permissibility or impermissibility of sex discrimination is far from a settled question. No consistent standard of review has emerged, but rather the Court has adopted an "intermediate" level, or what some have referred to as a "sliding scale," of review.[3] What is important is that even when this Court has struck down "unequal" standards for men and woman, it has done so on narrow grounds, for example ruling that the particular discrimination at issue might "perpetuate a stereotype" (as in *Mississippi U. for Women v. Hogan*, 458 U.S. 718 (1982)), but not because gender distinctions are inherently suspect.

In the last 30 years, this Court has repeatedly upheld unequal laws for men and women such as in *Kahn v. Shevin* (416 U.S. 351 (1974)), *Schlesinger v. Ballard* (419 U.S. 498 (1975)), *Califano v. Webster* 430 U.S. 313 (1977), *Regents v. Bakke* (438 U.S. 265 (1978), *Rosker v. Goldberg* (453 U.S. 57 (1981)), *Cal. Federal v. Guerra* (479 U.S.272, (1987).

This Court continues to uphold the view that the Fourteenth Amendment does not require that men and woman be treated equally in all respects. As Justice Rehnquist wrote for the majority

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[3] The "sliding scale" standard was first espoused by Justice Marshal's dissent in *Dandridge v. Williams* (397 U.S. 471 (1970), and while that view has never been officially embraced by this Court it is hard to see much difference between a multiple level scale and a "sliding scale."

in *Michael M. v. Sonoma County* (450 U.S. 464 (1981)) (in which criminal violations for statutory rape were applied only to males):

> Gender-based classifications are not "inherently suspect" so as to be subject to so-called "strict scrutiny," but will be upheld if they bear a "fair and substantial relationship" to legitimate state ends. *Reed v. Reed*, 404 U.S. 71. Because the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same," *Rinaldi v. Yeager*, 384 U.S. 305, a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

As recently as 1996 (in *US v. Virginia,* 518 U.S. 515) this Court went out of its way to emphasize that:

> The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible."

We believe that given the clear intent of the Framers, the consistent precedents from 1870s through the 1970s, and the somewhat ambiguous rulings since then, that this Court must be very careful not to convert the "equal protection clause" into something it was never intended to be: a de facto Equal Rights Amendment. Nor should this Court adopt "dynamic interpretation, departing radically from the original understanding" in order to come to a conclusion no matter how desirable that conclusion may be to some people.

The fact that no State may "deny to any person within its

jurisdiction the equal protection of the laws" simply does not mean a State must treat all people equally:

An infant, a foreigner, an insane person, and a competent adult citizen are all entitled to "equal protection of the laws" within a State's competent jurisdiction–each is entitled to protection of the State as much as any other. Clearly, however, infants, foreigners, the insane and adult citizens have widely divergent legal rights. Only by plucking the word "equal" out of all historical and even linguistic context, could one attempt to convert "equal protection" into "equal rights."

B. The Ninth Circuit's Attempt to Redefine FMLA as a Fourteenth Amendment Issue is wrong

The legislative history of FMLA suggests that Congress did not consider FMLA to be enacted under the Fourteenth Amendment. The House Committee on Education and Labor for example concluded, "The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition" (H.R. Rep. No. 103-8, pt. 1, at 29 (1993).

Similarly the Committee on Post Office and Civil Service noted with respect to FMLA "If an employer denies benefits to its work force, it is in full compliance with anti-discrimination laws because it treats all employees equally." (At 11, also cited by the Sixth Circuit in *Sims v University of Cincinnati* (99-3274) section 3B). This statement strongly suggests that the committee believed that FMLA was doing more than could be required under "civil rights" legislation.

The Act's language suggests that Congress was acting under the "commerce clause." Section 2611(4)B declares "a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce."

The legislation as enacted made no attempt to ensure

"equal" benefits for men and women since it explicitly avoided pre-empting state legislation which gave greater benefits, even when those benefits were more favorable to women. Legislators, for example, surely knew that California gave longer maternity leave to new mothers than FMLA would guarantee to new fathers and that such a policy had been upheld by this Court in *Cal. Fed v. Guerra* (479 U.S. 272 (1987)).

A Fourteenth Amendment provision presumably would have made some effort to ensure that state laws which provided additional benefits did so on a "gender neutral basis." No such effort was made. Failure to do so, coupled by the explicit assertion that "a public agency shall be considered to be a person engaged in commerce" leads inexorably to the view that Congress was most likely appealing to interstate commerce.

C. The Ninth Circuit misconstrues the long history of constitutionally permissible "unequal" treatment of men and women

In attempting to compensate for the lack of a history of unconstitutional discrimination by the States in employment, the Ninth Circuit decision declared that: "when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress separately and redundantly to provide detailed findings of such discrimination in order to exercise it's fourteenth amendment powers" (16776).

However, the "history of unconstitutional discrimination" cited by the Ninth Circuit is decisions such as *Bradwell v. Illinois*, and other decisions of this Court upholding unequal treatment–decisions penned by some of this Court's most eminent and respected jurists. What the Ninth Circuit is bemoaning is the fact that this Court has repeatedly found unequal treatment to be perfectly *constitutional*, and citing those rulings as a history of *unconstitutional* action.

The Ninth Circuit even goes so far as to criticize "The

modern trend noted above to provide more generous family care leave to women" (at 16777) despite this Court's recent decision in *Cal Fed. v. Guerra*.

The Ninth Circuit seems to be making the rather perverse argument that since the Constitution for so long was understood *not* to require equal treatment for women, that fact justifies re-interpreting the same provisions of the Constitution to compensate.

Prior to 1971 there were no findings of unconstitutional state sex discrimination by this Court. Rather than demonstrating a record of unconstitutional discrimination, it appears to us on the contrary to be evidence that there is nothing unconstitutional about the "unequal" treatment of men and women.

The Ninth Circuit tries to make much of the fact that "before 1969 EVERY State had some form of labor legislation 'protective' of woman only" (emphasis original). Far from being an argument that such "protective laws" are unconstitutional, it would seem to provide strong *prima facie* evidence that such laws are permissible, especially given this Court's frequent review and approval of such laws. Surely, however, it is a uniquely perverse argument to think that laws being so universally accepted is somehow evidence that they were stereotypes and therefore are now unconstitutional.

The history of state legislatures repealing many of these laws, only helps demonstrate that women are not a "discreet and insular minority" in need of protection from this Court. The history also demonstrates the benefits of representative government that state laws have changed with the changing values of our society, rather than being etched in stone as a result of decisions of this Court. Indeed, the Courts must always be careful to avoid elevating contemporary (and perhaps transitory) standards into constitutional requirements.

Dealing with issues of sex discrimination should be a matter reserved to the States to handle. Since women constitute more than 50% of the electorate they are more than able to protect

themselves through ordinary democratic means.

II. FMLA is about social policy, not civil rights, and exceeds the power of Congress to regulate commerce among the States

The Ninth Circuit declares that Congress "appropriately enacted the FMLA under the Fourteenth Amendment . . . to foster equal participation in both economic *and domestic life* by both men and women" (emphasis added, at 16777-8). Statements such as this, combined with the Findings and Purposes of the act helps illustrate that FMLA is far more about social policy than about civil rights, or even regulation of commerce.

As Justice O'Connor wrote for the majority in *New York v. U.S.* (505 U.S. 144 (1992)):

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.

FMLA is precisely the sort of legislation which falls into this category. We think the framers of the Fourteenth Amendment, as much as of the original Constitution, would be shocked by FMLA for both reasons. We doubt that the commerce clause provides enough justification to warrant federal intrusion into an area of family law and social policy long regarded as the province of the States, but such legislation under the Fourteenth Amendment is even less tenable.

The States, as a matter of their general jurisdiction have the authority and responsibility to pass laws which will encourage strong and healthy families. Of course, any such legislation which makes use of contemporary understanding about the proper roles of

family members is liable to be labeled by some future age as based on stereotypical views. In fact, while many people today believe that families are more healthy in a traditional two parent (mother and father) situation, others discount that as a stereotype.[4]

In any case, while we believe that States may encourage healthy families (and indeed family law remains an area of law "reserved to the States") regulation of private action, particularly domestic life certainly cannot be within the boundaries of enforcing equal protection of the laws. To uphold such a view one "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the commerce clause" or the Fourteenth Amendment "to a general police power of the sort retained by the States" (*Lopez* 514 U. S. 549 at 568).

Even viewed under the banner of regulating interstate commerce we believe that FMLA exceeds the authority of Congress and intrudes upon areas of law constitutionally reserved "to the States" under the Tenth Amendment.

In Federalist 45 James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.
>
> These words have been cited by this court over and over in

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[4] The point is that one man's stereotype is another man's truism, and so basing constitutional law on the assertion that "stereotypes" disqualify a law tends to reduce constitutional law to the variable and subjective standard of what a judge happens personally to believe constitutes a stereotype.

recent years as the central expression of the Founders regarding the division of powers between local and national government, particularly with reference to analyzing the commerce clause powers of Congress (e.g. dissent in *Garcia* (*469 U.S. 528 at 570)*, *Gregory v Ashcroft* (501 U. S. 452 at 468 (1991)), *Lopez v. US* (514 U.S. 550, at 553), *US v. Morrison* (529 U.S. 598, at sec. II)).

The Findings and Purposes section of FMLA sec. 2601 lacks even the hint that FMLA was enacted to promote or affect interstate commerce. According to its Purposes, 2601 (b) 1, it was enacted primarily in order "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." Neither the commerce clause or any enumerated power of Congress gives the federal government jurisdiction to pass laws "preserving family integrity." That is precisely the sort unenumerated power reserved to the States. Lack of any statement in the Purposes section tying the legislation to national economic needs suggests that "[a]bsent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." (*Lopez*, Concurring opinion of Kennedy and O'Connor).

Any suggestion that FMLA is based on regulation of commerce would seem to based on the "national productivity" argument that the government advanced in *Lopez*. Yet as Chief Justice Rehnquist wrote concerning that argument:

> [U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of 922(q),

> it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Moreover, two years ago in *Morrison*, the Chief Justice, paraphrasing the above quote from *Lopez*, explicitly cited "childrearing" as an area of family law reserved to the States. Again discounting the "national productivity" argument this Court declared that "such reasoning will not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."

FMLA is a significant federal intrusion into what could well be described as family law, as well as child care. If child custody and child rearing issues go beyond federal power to regulate commerce, then it is hard to see how leave-taking provisions of FMLA should be viewed any differently, even if issues of child care do affect the productivity of some workers.

Finally, we would also suggest the Court take this opportunity to review the 5-4 ruling in *Garcia v. San Antonio* (469 U. S. 528 (1985)), in which the majority declared that whatever limitations there were on the commerce clause powers of Congress that Congress alone was to decide those limits, and in so doing subjected state and local government to labor laws passed under the "commerce clause." The reasoning in *Garcia* has been quite openly rejected in *New York v. US*, *Lopez v. US*, and *US v. Morrison*.

Since *Garcia* has been implicitly undermined by more recent decisions, it ought to be explicitly abandoned.

If *Garcia* has been implicitly overruled it would make sense to return to something like the *status quo ante*, as expressed in *National League of Cities v. Usery* (426 U.S. 833 (1976), in which the court noted that traditional areas of local responsibility were a buffer to the commerce clause powers of Congress, an approach suggested by *Lopez*, and *Morrison*.

Secondly, with respect to *Garcia*, at oral arguments for *Alden v. Maine* (527 U.S. 706) the Solicitor General argued that if States could not be sued for violation of FLSA that the statute may as well be "written in disappearing ink." It should now disappear.

What is more, *Garcia* runs counter to the fundamental structure of the federalism. As Madison wrote in the Federalist 39:

> [T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.

It is as preposterous for the federal government to determine the pay and qualifications for local employees, as it is for a local government to determine the pay and qualifications for federal troops.

III Irrespective of whether "sex discrimination" is prohibited by the Fourteenth Amendment, failure to provide pregnancy or sick leave have recently been found to be constitutional, and there is no reason to regard "family leave" any differently

Neither refusing maternity leave nor providing maternity leave for women only have been found to be "invidious discrimination under the Equal Protection Clause."

The Ninth Circuit opinion makes a great deal of Congressional testimony on FLMA that declared that, "In the absence of a family leave standard, child birth and the need to care for a sick child or parent have an adverse impact on woman's

earnings." S. Rep. 102-68 at 37 (cited 16786).

While it is undoubtedly true that the need to miss work in order to give birth to a child (or for any other reason) often has "an adverse impact on woman's earnings," this Court has already ruled that it is no violation of equal protection when such leave is denied. In *Guldug v. Aiello* (417 U.S. 484 (1974)), this Court declared that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition" (at 497).

Two years later when the circuit court tried to argue that sex discrimination under title VII prohibited the kind of laws upheld in *Guldug* this Court reaffirmed in *General Electric v Gilbert* that "exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." (429 U.S. 125 at 136 (1976)).

In addition to providing no leave, this Court has also upheld state provisions providing additional leave to women only in *Cal Fed v. Guerra* (479 U.S. 272 (1987).

These precedents strongly suggest that failure to provide sick leave or leave to care for the ill does not violate equal protection.

As this Court noted in *General Electric* (429 U.S. at 139):

> For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other.

Applying that same reasoning to the care-taking leave provisions at issue in the current case, results in the same conclusion. Even if it could be shown that providing no leave to care for an ill relative weighed "more heavily upon one gender than upon the other" that would not be sufficient to constitute discrimination. It would also run afoul of the "common sense notion" that if an employer offered no family leave at all, and treats everyone the same, that such an employer somehow was discriminating, because it affected some women (but not all women) more than other people.

Lack of care-taking leave would, of course, also affect some men, (those with sick children or relatives, who wished to take leave) more than it would affect some women (single women with no relatives, for example). Such a circumstance does not fit very neatly into traditional "discrimination."

In addition, we believe that the "disproportionate impact" argument is an amorphous claim which could be used to challenge almost any state or federal law simply by showing a statistical disproportion among sexes, races or religions. For example, a recent study published in *Journal of Marriage and the Family* shows that religious fathers want to spend more time with their families than fathers with no religion. One could argue that failure to provide family leave disproportionately affects religious parents. Also, it is undoubtedly true that some ethnic groups are more family oriented than others. It could also be argued that lack of care-taking leave is "age discrimination" since its disproportionately affects parents of child-bearing age.

Obviously, laws (or policies) of general applicability will impact some groups differently than others, if Congress could intervene any time State policies resulted in some sort of statistical imbalance among races, religions or sexes there would be no limit to Congressional power to interfere in local matters.

Since neither the family leave provision nor any of the other provisions of FMLA prevent or rectify a type of discrimination

prohibited by the Fourteenth Amendment, FMLA is not justifiable under "equal protection" even taken at its widest understanding.

Even granting that the enforcement powers cut a somewhat wider swath than is absolutely prohibited by the Fourteenth Amendment, if Congress had attempted to require pregnancy leave, for example, under the Fourteen Amendment even after this Court had so explicitly ruled that it was not an equal protection issue, that certainly seems to go to creating new constitutional rights, not enforcing old ones. Neither Congress nor the courts may create substantive constitutional rights in the name of equal protection (*San Antonio School Dist. V. Rodriguez*, 411 U.S. 1 (1973)).

IV Even if Sex Discrimination in employment were prohibited under the Fourteenth Amendment, and even if failure by a State to provide leave resulted in such discrimination, FMLA would still not be a reasonable and proportionate Congressional response because it does not counteract such alleged discrimination.

Both the Ninth Circuit and the government based much of their argument on the assertion that (as the government puts it):

> By setting a minimum standard for family leave for all eligible employees, the FMLA extends to men the types of leave benefits more often available to women and, at the same time, helps to eliminate the stereotype that only women[5] are responsible for family care-giving, while deterring employers from making hiring and promotion decisions based on stereotypes about how family responsibilities should be allocated (Government brief

[5] It is important to note the government's exaggeration of the alleged stereotype. Surely it is not the case that many people think that "ONLY women are responsible for family care-giving" thus the government and Ninth Circuit attack stereotypes which do not even exist.

urging denial of cert, sec. 4).

It is unlikely however that FMLA either helps overcome stereotypes, or diminishes employer fear of females disproportionately taking leave. These goals were based on unwarranted assumption, which have been exposed by the practice of FMLA, but should already have been known both through common sense and the experience of other countries.

In its Findings for FMLA Congress declared that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." Therefore, Congress would extend paternity leave to men in order to counteract this preference to higher men. The same reasoning presumably applies to family leave. By extending care-taking leave to men employers would allegedly have less reason to prefer men over women because of care-taking time off.

This reasoning, however, is based on the false assumption that if men and women are both "equally" afforded the "opportunity" to take leave, that men and women would take equal advantage of it. That is not the case, however. Women take leave under FMLA both far more often and for much longer periods of time.

The 1995 and 2000 government studies found that about 42% percent of FMLA users were men, (41.8 and 42.3% respectively). Given that men represent almost 60% of the full-time civilian workforce, those number grow even more out of proportion. The 40% of the workforce that is female is taking 60% of the leave. Thus a woman employee is about twice as likely to take leave as a male employee. Care-taking leave is even more disproportionate.

Personal sick leave provisions (which make up a little more than half of all FMLA leave, 52.4% in 2000) are probably invoked at approximately equal rates by men and women. That means that the maternity and care-taking provisions of FMLA are invoked by

a female employee about three times as often male. Maternity disability is less than 8% of leave in the 2000 study, but the longest in time. Since maternity disability is such a small percent of leave taken, women take care-taking leave far more often than men.

Moreover, women are not only far more likely to take leave, but also to take leave for much longer periods. Department of Labor statistics show that while many women take the full 12 weeks, or even longer for the birth of a child, most new fathers do not take FMLA leave at all, and when they do it is typically for only a few days, rather than many weeks or months typical of a new mother.

If Congressional intent in passing FMLA was to "dispel the myth" that women were more likely than men to take leave, then FMLA was not only a failure, but in fact, has actually tended to confirm it. When both men and women are given equal access to family and medical leave, a woman is far more likely to invoke leave than a men, and for far longer periods. Experts we consulted estimated that about 85% of FMLA leave (in terms of time taken) is taken by women.[6] Again, since women represent a significantly smaller part of the eligible full time workforce, a little over 40% of the workforce is taking 85% of the leave–a hugely disproportionate amount. Moreover, other countries which have granted leave on a gender neutral basis find that the vast majority of family leave is taken by women–typically about 85% of leave, and in some countries as much as 99%.

Several studies of European patterns point out the vast disparity between men and women in how leave is used. Sheila Kamerman writing in 2000 noted that even though family leave was offered on a gender neutral basis "only about 1 percent of fathers in Germany [and Austria] took advantage of the right to child rearing leave, less than 5 percent in Denmark and Finland,"

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[6] This figure was suggested in talks with Professor Zigler of Yale and Professor Kamerman of Columbia both recognized experts on FMLA.

and even when fathers did take leave "the actual portion of possible time that fathers used is quite low (about 11 percent)" (Kamerman, "Parental Leave Policies," in *Social Policy Report*, 2000, p. 9). Participation of new fathers in many European countries remains in the single digits. The only exceptions to this dismal rate of participation for fathers has been in a few Scandanavian countries where they have begun "requiring that fathers take at least a specified minimum part the leave" according to Kamerman. Kamerman concludes her study noting that "Coverage is extensive and take-up is high among women everywhere that the leave is paid, and the benefit level is adequate; but take-up remains modest for fathers everywhere except in Sweden. . . . Gender equity remains a goal even if largely unachieved" (Family Leave, 14)

The government's assumption that men and women would tend to make equal use of leave when offered family leave on the gender neutral basis is based on the assumption that men and woman will behave the same way when given the same opportunities.

So if, as the government argues, Congress went beyond the requirements of the Fourteenth Amendment in order to enact legislation that would counteract stereotypes, and discourage discrimination in employment, then clearly FMLA is not justifiable in terms of these goals since it has not accomplished them. In fact, it has reinforced the view that women use family leave far more than men.

If "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender" then just as surely a law which one gender makes use of disproportionately (by about 10 to 1 in terms of time off) also has "serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." FMLA seems to encourage the very thing it said it was trying to avoid.

In fact, this is another thing noticed in studying the

European experience. A study of the European leave policies conducted by Moss and Deven in 1999 concluded that extended family leaves required under European laws, which in some ways are intended to encourage women to have more children and spend more time with them, actually tended to reinforce the "stereotypical roles of women" as mothers first and workers second (cited in Kamerman, 10).

The two alleged goals of FMLA to some extent seem to be conflict with each other, in that, as it allows women to take off more time for care-taking, it encourages employers to view these woman as primary care-takers.

V. Even if FMLA were justifiable under the Fourteenth Amendment, that would not be sufficient to justify private suit in federal Court against States.

As in past briefs submitted by Coalition for Local Sovereignty for *Kimel v. Florida* and *Alabama v. Garrett*, we again respectfully suggest the Court take this opportunity to review its ruling in *Fitzpatrick v. Bitzer* (427 U.S. 445)–a review made all the more appropriate given that this case also deals with alleged "sex discrimination" issues.

Fitzpatrick remains the only time that this Court has permitted a suit against a State based on the theory that the Fourteenth Amendment over-rules the Eleventh. As such, *Fitzpatrick* is a unique and solitary departure from over 100 years of precedent with respect to the relation of the two amendments.

Fitzpatrick is surely one of the most remarkable decisions in Supreme Court history. Without any significant discussion of prior precedent, without any analysis of the history of the Fourteenth Amendment, and in the course of a remarkably short few pages the *Fitzpatrick* decision declared a part of the constitution effectively null and void under certain circumstances. It remains the only time in history that this Court has so ruled that one part of the constitution has implicitly been overruled by

another part.

The opinion cites only two prior cases to help justify its conclusion, but acknowledges that, "It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under 5 of the Fourteenth Amendment." Thus the opinion acknowledged the lack of prior precedent for its decision.

Immediately following this sentence the opinion goes on to set out the reasoning for concluding that Fourteenth Amendment overrules the Eleventh:

> But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S. 1 (1890), are necessarily 'imited by the enforcement provisions of 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts (at 456).

This assertion is open to criticism on many fronts. As David Currie has written about it, "This reasoning is less than overwhelming. One might have thought that subsection 5, like other plenary grants of power, was subject to explicit and implicit

constitutional limitations, one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violations of the amendment]." [Currie, *The Constitution in the Supreme Court* (Chicago, University of Chicago Press, 1990), 573]

The assertion that the provisions of the Eleventh Amendment are "necessarily limited by the enforcement provisions of 5 of the Fourteenth Amendment" simply defies all usual rules of legal interpretation, 100 years of precedent to the contrary and the explicit statements of many of the Framers of the amendment.

The Eleventh Amendment is certainly not "necessarily limited" by the Fourteenth as there are other possible ways of enforcing the amendment while not permitting suits against States, such as 1) private suits only against individual state officials, 2) suits by the federal government against States which violate the Fourteenth Amendment, and 3) review by this Court of state court decisions denying Fourteenth Amendment rights.

In fact, the debates of the Framers strongly suggest that these other means of enforcement were what was foreseen when the Fourteenth Amendment was put together. Rep. Bingham, for example, in expounding the effect of his first draft of the Fourteenth Amendment declared:

> The question is, simply whether you will give by this amendment to the people of the United States the power by legislative enactment to punish officials of States for violations of oaths enjoined on them by the Constitution. This is the question and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. (Globe, 1034)

This quote leaves little doubt that Bingham believed that the enforcement powers of the amendment would work against individual state officers, rather than against States as such. This view is further buttressed by the fact that such was the view of this Court for over an entire century following ratification of the

Fourteenth Amendment.

One of the most explicit statements of this by the Court is found in *Ex Parte Young* (209 U.S. 123, at 149), where the Court declared:

> The 11th Amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state. The 14th Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws. The case before the circuit court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full force, and that we must give to the 11th Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.

Such an interpretation is the only one in line with standard rules of interpretation. When two provisions of law are being considered they always should be interpreted, if possible, in such a way as to give both full effect, and one should not be regarded as invalidating the other unless there is no other rational way of interpreting them. Such is surely not the case with the Eleventh and Fourteenth Amendments. Despite clear hostility of this Court at various times to the Eleventh Amendment, and attempts such as *Parden v. Terminal Railway* (377 U.S. 184) to reduce the scope of

the Eleventh Amendment, both Amendments were still understood to exist side by side.

Finally, the "implicit" over-ruling of the Eleventh Amendment by the Fourteenth runs contrary to all of this Court's recent discussions on the need for Congressional enactments to be explicit and unequivocal to nullify Eleventh Amendment immunity.

It has become well established doctrine that at a minimum Congress must have "unequivocally expresse[d] its intent to abrogate the immunity," *Seminole Tribe* (517 U.S. 44), citing *Green v. Mansour*, 474 U.S. 64, 68 (1985); and *Seminole Tribe* went on to declare (at 54):

> Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement." Blatchford, 501 U.S., at 786 . This rule arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 - 239 (1985); Quern v. Jordan, 440 U.S. 332, 345 (1979). In Atascadero, we held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

If such a strict standard is applied to ordinary legislation, we fail to comprehend how any lesser standard could be applied to constitutional provisions themselves. Should not any conclusion the Fourteenth Amendment was intended to abrogate Eleventh Amendment immunity also be required to be unequivocally expressed and require a "clear legislative intent?" It seems very likely that "a general authorization" such as "Congress shall have power to enforce by appropriate legislation," can only be regarded as "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

In this regard it is also worthwhile to remember "the 'old and well-known rule that statutes which in general terms divest pre-

existing rights or privileges will not be applied to the sovereign without express words to that effect," *United States v. Mine Workers*, 330 U.S. 258, at 272.

Not only common sense tells us that at least the same sort of clarity ought apply to constitutional law as to statutory law, but also repeated statements of this Court have further driven home that point.

Chisolm v. Georgia noted that "A State retains all of its sovereignty unless there is *specific and explicit* cession of the that sovereignty." Two centuries later in *Alden* (also citing *Blatchford*) this Court noted that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the Constitutional design" (at II)

The *Fitzpatrick* decision cites no "completing evidence" nor any "specific and explicit" cession of sovereignty, it offers no more than an assertion that the Fourteenth Amendment was designed to effect a "fundamental shift" in State/federal relations. There is ample room for debate about whether the framers sought such a fundamental shift, but even if one accepts that it did, it is still a mere assumption that such a shift included the ability for private citizens to sue States in federal court.

The Eleventh Amendment, on the contrary is "specific and explicit" about what federal courts may not do. To overrule a "specific and explicit" provision by appeal to the "implied powers" of another amendment simply strains every rule of legal interpretation. Indeed, as Alexander Hamilton declared in Federalist 81 on this very question, "to ascribe to the federal courts, by mere implication, and in destruction of pre-existing right of state governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

As this Court ruled in 1921:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given" (*In Re New York* (256 U.S. 490 at 497)).

It seems inexplicable to us that such a "fundamental rule of jurisprudence" could be set aside so easily "by mere implication."

Finally, while several recent decisions (*Seminole Tribe, Florida Prepaid, Alden, University of Alabama*) have repeated the *Fitzpatrick* view that the Fourteenth Amendment can validly abrogate the Eleventh Amendment, that view was ultimately irrelevant to the decisions, since none of these recent cases has concluded that the *Fitzpatrick* doctrine was applicable. That would make the restatement of the *Fitzpatrick* doctrine mere dicta in these cases. *Fitzpatrick* itself remains a unique ruling of the Court unprecedented both before and after.

This Court has not hesitated to overturn Eleventh Amendment precedents of *Parden* and *Union Gas* which were clearly wrong. We believe that *Fitzpatrick* is similarly unsupportable by sound constitutional interpretation. Even if this Court does not overturn *Fitzpatrick* in the present case, we can only urge that any extension or application of the *Fitzpatrick* doctrine would be highly inappropriate.

CONCLUSION

This Court's decision in *City of Beorne v. Flores* took a giant step in protecting local governments from undue Congressional interference. One reason that decision was so powerful was that it actually took time to consider the historical meaning of the Fourteenth Amendment. *Florez* emphasized that

the Fourteenth Amendment was intended to accomplish only limited objectives, and not to grant Congress general power to legislate broadly on any matter affecting life, liberty or equality:

> Members of Congress from across the political spectrum criticized the [original version of the] Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. . . . Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. (521 U.S. 507)

To uphold FMLA as a valid enactment of Congress would truly be to "work an entire change in our form of government." It would convert the Fourteenth Amendment into a general grant of authority for Congress to go well beyond the substantive requirements of the Amendment and legislate generally on almost any subject.

To avoid this result we urge this Court to stay as close as possible to the original understanding of the Fourteenth Amendment as so ably demonstrated by Justice Kennedy in his majority opinion in *Flores*. We believe that history (and this Court's subsequent interpretation) makes clear three important facts, 1) the framers never intended for "sex discrimination" to be a specially suspect action under the amendment, 2) there is no evidence that they regarded the Eleventh Amendment as contradictory to the new amendment, and 3) the amendment was intended to be no more than remedial for a few specific problems, not to grant Congress plenary power to legislate broadly.

Just as *Flores* concluded that RFRA had been "a considerable congressional intrusion into the States' traditional prerogatives," FMLA threatens the same type of intrusion, first

from Congress under an expanded view of the Fourteenth Amendment, and secondly, from federal courts, as States will be called upon regularly to defend themselves from suit in federal court for the most basic employment decisions.

While States' ability to be free from federal suit in decisions about leave policies may not in itself seem to be a very great invasion of State sovereignty the principal remains one of central importance, something this Court has called "a fundamental rule of jurisprudence" (*In Re New York*).

Such fundamental constitutional provisions should not be lightly cast aside.

For these reasons we urge that the Court of Appeals decision be reversed.

Respectfully submitted,

Kenneth B. Clark, Counsel of Record